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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 21/2018 concerning Ghasem Hamedani (Australia)[1]

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 1 February 2018 the Working Group transmitted to the Government of Australia a communication concerning Ghasem Hamedani. The Government replied to the communication on 3 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

[1] In accordance with rule 5 of the Working Group's methods of work, Leigh Toomey did not participate in the discussion of the present case.

disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Hamedani, born in 1973, is an Iranian national. He usually resides at the Villawood Immigration Detention Centre in New South Wales, Australia.

5. The source reports that Mr. Hamedani is a former intelligence officer who fled the Islamic Republic of Iran in the context of being court martialled and persecuted, following his refusal to support the regime of Bashar al-Assad in the Syrian Arab Republic. He is reported to have suffered significant torture and trauma.

Arrest and detention

6. According to the source, Mr. Hamedani arrived on Christmas Island, Australia, by boat on 5 August 2013 in order to seek asylum. He was immediately detained by officials from the Department of Immigration and Border Protection. The source reports that all persons arriving by boat are issued with a type of warrant issued by the Department, but no documents are currently available.

7. The source submits that, on 19 July 2013, the Government of Australia declared a new policy that all persons seeking asylum and arriving by boat would be transferred to a regional processing centre and would not be permitted to engage the protection obligations of Australia. On or about 5 August 2013, Mr. Hamedani was therefore transferred to Manus Island, Papua New Guinea, where he was placed in administrative detention. The source also submits that Mr. Hamedani has been recognized as a refugee by the Government of Papua New Guinea since March 2015.

8. On 5 August 2016, Mr. Hamedani was reportedly transferred to Australia for medical treatment. In that respect, the source notes that he has been diagnosed with a range of mental health disorders, including post-traumatic stress disorder. However, he has now been in closed administrative detention for a period of approximately four and a half years and continues to be detained at the Villawood Immigration Detention Centre.

9. According to the source, Mr. Hamedani is being detained on the basis of the Australian Migration Act 1958. The Act specifically provides in sections 189 (1), 196 (1) and 196 (3) that unlawful non-citizens must be detained and kept in detention until they are: (a) removed or deported from Australia; or (b) granted a visa. In addition, section 196 (3) specifically provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

Legal analysis

10. The source submits that the detention of Mr. Hamedani constitutes an arbitrary deprivation of his liberty, falling under categories II, IV and V.

11. The source considers that Mr. Hamedani has been deprived of liberty as a result of the exercise of his right guaranteed by article 14 of the Universal Declaration of Human Rights, whereby everyone has the right to seek and to enjoy in other countries asylum from persecution. The source thus submits that the detention of Mr. Hamedani constitutes an arbitrary deprivation of his liberty, falling under category II.

12. The source also submits that Mr. Hamedani, as a refugee, who is subject to prolonged administrative custody, has not been guaranteed the possibility of administrative or judicial review or remedy.

13. With regard to sections 189 (1), 196 (1) and 196 (3) of the Migration Act, the source highlights that, in the case of Mr. Hamedani, removal or deportation would constitute refoulement, and he is ineligible for a visa in Australia as he has been included in the regional processing arrangement between Australia and Papua New Guinea. In that respect,

the source asserts that, under international law, Australia was responsible for Mr. Hamedani's transfer to and detention on Manus Island.

14. The source notes that the High Court of Australia upheld the mandatory detention of non-citizens as a practice that is not contrary to the Constitution of Australia.[2] The source also notes that the Human Rights Committee held that there is no effective remedy for people subject to mandatory detention in Australia.[3] As such, there is little chance that Mr. Hamedani's detention will be the subject of a real administrative or judicial review or remedy. His detention thus constitutes an arbitrary deprivation of liberty, falling under category IV.

15. Furthermore, the source submits that Australian citizens and non-citizens are not equal before the courts and tribunals of Australia. The effective result of the decision of the High Court in *Al-Kateb v. Godwin* is that, while Australian citizens can challenge administrative detention, non-citizens cannot. The detention of Mr. Hamedani thus constitutes an arbitrary deprivation of his liberty, falling under category V.

16. The source underlines that Mr. Hamedani has exhausted all domestic remedies to secure his release into the Australian community. Due to the fact that Mr. Hamedani has been included in the regional processing arrangement with Papua New Guinea, his domestic remedies are reportedly extremely limited. Indeed, the only domestic remedy is for Mr. Hamedani to appeal to the Minister for Immigration and Border Protection to be granted a community detention placement under the Migration Act. It is understood by the source that, in May 2017, the Department of Immigration and Border Protection generated such an application in order to place Mr. Hamedani in community detention. However, several months later, no response has reportedly been received and Mr. Hamedani remains in detention.

17. In that respect, the source notes that some community detention applications are processed within two weeks. The source states that it is obviously possible for the Government of Australia to deal with community detention placement requests in a short period of time. No explanation has reportedly been given for the delay in processing Mr. Hamedani's application.

Response from the Government

18. On 1 February 2018, the Working Group transmitted the allegations from the source to the Government of Australia under its regular communications procedure. The Working Group requested the Government to provide, by 3 April 2018, detailed information about the current situation of Mr. Hamedani and any comments on the source's allegations.

19. In its reply of 3 April 2018, the Government explains that its border protection policies aim to disrupt and deter people from engaging people smugglers and attempting dangerous journeys to Australia by boat. Its policies were implemented in response to a dramatic increase in the number of people attempting illegal migration to Australia by boat between 2008 and 2013.

20. The Government notes that under its current border protection policy, illegal maritime arrivals — referred to in the Migration Act as unauthorized maritime arrivals — will be returned to their departure points or homes, or transferred to a regional processing country and will thus not settle permanently in Australia. According to the Government, those policies have succeeded in stemming the flow of boats, disrupting the people-smuggling business model and preventing loss of life at sea.

21. Consistent with the Migration Act, illegal maritime arrivals who arrived in Australia after 13 August 2012 have been taken to a regional processing country, either Papua New Guinea or Nauru, to assess their protection claims. The position of the Government is that it has not and does not exercise effective control over persons taken to Papua New Guinea under regional processing arrangements.

[2] See decision in *Al-Kateb v. Godwin* (2004) 219 CLR 562.

[3] See *C. v. Australia* (CCPR/C/76/D/900/1999).

22. According to the Government of Australia, the former Manus Regional Processing Centre was a matter for the Government of Papua New Guinea as it was located within that country's sovereign territory and was managed and administered under its domestic law and in accordance with its international legal obligations. Once the transferees were in Papua New Guinea, which is relevantly a party to the Convention relating to the Status of Refugees and the Covenant, the obligations of Papua New Guinea under those international instruments were engaged.

23. The Government notes that it supports the Governments of Papua New Guinea and Nauru to meet the health needs of persons transferred there. Some individuals have presented health issues that require medical treatment not available in a regional processing country. Some of those individuals, including Mr. Hamedani, have been transferred to Australia as transitory persons for the temporary purpose of medical treatment. In some cases, family or other support persons have accompanied the person receiving treatment (also transitory persons). The Migration Act requires that transitory persons be returned to a regional processing country as soon as reasonably practicable when they no longer need to be in Australia for the temporary purpose for which they were transferred.

24. The Government also notes that persons brought to Australia for a temporary purpose are unlawful non-citizens under the Migration Act and must be detained unless subject to a residence determination, which is often referred to as community detention. The Minister for Immigration and Border Protection may make a residence determination where he considers it is in the public interest to do so.

25. The Minister's power to make a residence determination is reportedly personal, discretionary and non-compellable. The Minister does not have a duty to, and is not legally bound to, exercise or consider exercising any of his powers. The Minister has approved guidelines on his residence determination powers. A departmental officer will make an assessment as to whether the specified person meets the approved guidelines and, where the guidelines are met, refer the specified person to the Minister for consideration of the exercise of his public interest power.

26. The Government further explains that detention under the Migration Act is administrative in nature and not for punitive purposes. The Government is committed to ensuring that all people in administrative immigration detention are treated in a manner consistent with the international legal obligations of Australia.

27. The Government claims that both Australian citizens and non-citizens are able to challenge the lawfulness of their detention in a court, through actions such as habeas corpus. The basis on which a court may order release depends on the type of detention. As it is not lawful to detain a citizen or a lawful non-citizen in immigration detention under the Migration Act, a citizen or a lawful non-citizen would be released immediately if they were detained in immigration detention by mistake. Other forms of administrative detention (other than immigration detention), and the ability to challenge them, do not depend on a person's immigration status.

28. According to the legislative framework of Australia, the length of immigration detention is not limited by a set time frame but is dependent upon a number of factors, including identity determination, developments in country information and the complexity of processing due to individual circumstances relating to health, character or security matters. Relevant assessments are completed as expeditiously as possible to facilitate the shortest possible time frame for detaining people in immigration detention facilities.

29. The Government's position is that the immigration detention of an individual on the basis that he or she is an unlawful non-citizen is not arbitrary per se under international law. Continuing detention may become arbitrary after a certain period without proper justification. Detention is reportedly a last resort for the management of unlawful non-citizens.

30. According to the Government, the case management practices of Australia ensure that any person who is detained understands the reason for their detention and the choices and pathways that may be available to them, including choosing to return to their country of origin or deciding whether to pursue legal remedies.

31. The immigration detention system is also subject to regular scrutiny, including visits, by external agencies such as the Commonwealth Immigration Ombudsman, the Australian Human Rights Commission and the Office of the United Nations High Commissioner for Refugees (UNHCR) to ensure that people in immigration detention are treated humanely, decently and fairly.

32. Against that background, the Government explains that Mr. Hamedani arrived on Christmas Island as an undocumented illegal maritime arrival on 31 July 2013 and, at the time of his arrival, he was reasonably suspected to be an unlawful non-citizen and did not hold a visa to enter Australia. Under section 189 (3) of the Migration Act, if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain the person.

33. On 2 September 2013, Mr. Hamedani was transferred to the Manus Regional Processing Centre under section 198AD of the Migration Act. As he arrived into Australia after 19 July 2013, he was subject to mandatory regional processing.

34. On 5 August 2016, Mr. Hamedani was reportedly brought to Australia for medical treatment and detained under section 189 (1) of the Migration Act. He was subsequently transferred to Concord Hospital the same day for medical treatment.

35. On 15 August 2016, Mr. Hamedani was discharged from hospital and transferred to the Villawood Immigration Detention Centre.

36. On 17 September 2016, Mr. Hamedani was reportedly found to be a refugee under the Papua New Guinea Refugee Status Assessment process.

37. The Government explains that, on 10 November 2016, Mr. Hamedani's case was referred internally within the Department of Immigration and Border Protection for consideration against the Minister's guidelines for the exercise of his residence determination power under section 197AB of the Migration Act (a residence determination). On 23 February 2017, Mr. Hamedani was found not to meet the guidelines for referral to the Minister.

38. On 15 May 2017, Mr. Hamedani's case was again referred internally for consideration against the Minister's guidelines for residence determination referrals. Mr. Hamedani was found to meet the guidelines, and, on 13 June 2017, a submission for residence determination under section 197AB of the Migration Act was sent to the Minister. As referenced above, the Minister's power to make a residence determination is personal, discretionary and non-compellable. To date, no decision has been made on Mr. Hamedani's residence determination.

39. According to the Government, Mr. Hamedani has a mental health condition and a history of self-harm. In February 2018, he underwent a psychiatric review and was noted to be at moderate risk of self-harm and deterioration in his mental health.

40. As the Minister has not made a residence determination, Mr. Hamedani currently remains in immigration detention at the Villawood Immigration Detention Centre. As Mr. Hamedani arrived to Australia as an illegal maritime arrival and has not been cleared for immigration, he is barred from lodging any visa applications in Australia under section 46 of the Migration Act.

41. The Government rejects claims made by the source that Mr. Hamedani has not been guaranteed the possibility of administrative or judicial review or remedy of his ongoing detention. According to the Government, a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia. Section 75 (v) of the Australian Constitution provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth.

42. The Government also rejects further claims made by the source that, as a result of the decision of the High Court in *Al-Kateb v. Godwin*, non-citizens are not equal before the courts. In that instance, the High Court held that the provisions of the Migration Act requiring the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

43. The Government reiterates that both Australian citizens and non-citizens are able to challenge the lawfulness of their detention in a court, through actions such as habeas corpus, as referred to above in paragraph 27.

44. The Government also rejects claims by the source that the removal of Mr. Hamedani, as a person recognized by Papua New Guinea as a refugee would constitute refoulement. The Government of Australia takes its protection obligations seriously, and its protection arrangements are premised on the fundamental obligation of non-refoulement.

45. The Government explains that since Mr. Hamedani remains an unauthorized maritime arrival for the purposes of the Migration Act, section 198AD and section 198AH require that he be taken to a regional processing country as soon as reasonably practicable when it is determined that the temporary purpose for which he was brought to Australia no longer applies.

46. In relation to the discretionary power of the Minister, the Government explains that the Minister has a discretion under section 198AE of the Migration Act to determine that it is in the public interest that an illegal maritime arrival not be taken to a regional processing country. This discretion is non-compellable and non-delegable. The Minister has approved guidelines on his discretion under section 198AE of the Migration Act. A departmental officer will make an assessment as to whether the specified person meets the approved guidelines and, where the guidelines are met, refer the specified person to the Minister for consideration of the exercise of his public interest power. These guidelines address where an illegal maritime arrival has made credible claims that he or she faces a threat to his or her life or freedom on the basis of race, religion, nationality, membership of a particular social group or political opinion, or face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the death penalty if returned to the regional processing country.

47. The Government also rejects allegations by the source that, with regard to sections 189 (1), 196 (1) and 196 (3) of the Migration Act, removal or deportation would constitute refoulement. Mr. Hamedani is an unlawful non-citizen and is required under section 196 of the Act to be detained until he is removed from Australia under section 198 or 199 of the Act, dealt with for the purposes of being taken to a regional processing country, deported under section 200 of the Act or granted a visa.

48. The Government explains that, as a transitory person brought to Australia for a temporary purpose, Mr. Hamedani must be removed from Australia as soon as reasonably practicable after he no longer needs to be in Australia for that purpose. The Government has never indicated that it intended to take him to any place except back to a regional processing country. The Government has maintained that it will return Mr. Hamedani to a regional processing country once the temporary purpose for which he came to Australia ceases.

Further comments from the source

49. On 3 April 2018, the response from the Government was sent to the source for further comments. In its response of 9 April 2018, the source rejects what it views as the essence of the reply provided by the Government of Australia, namely that, because open-ended detention (subject to certain events, discussed below) is lawful in Australia, such detention is either not arbitrary or otherwise complies with the State party's international obligations. The source submits that, in its submission to the Working Group, the Government acknowledges that Mr. Hamedani, as an unlawful non-citizen, is lawfully detained under Australian law. The source however also submits that such lawful (under Australian law) detention is arbitrary and open-ended (or worse, indefinite).

50. Furthermore, the source underlines that, by the Government's own admission, the purpose of the State party's border protection policies, which includes administrative detention, is not tailored to the individual circumstances of a particular asylum seeker or refugee. Instead, the purpose of offshore detention and indefinite detention (or detention for an indeterminate amount of time) is to provide deterrence to others. If administrative detention is not for the stated statutory purposes (i.e., visa processing or removal, under the Migration Act), then it ceases to have a basis in the Act and becomes punitive. The source

notes that this is also contrary to the constitutional separation of powers between the judiciary and executive.

51. The source rejects that habeas corpus challenge is a possible option for Mr. Hamedani. Since his detention is lawful under Australian law, habeas corpus challenge is not applicable as this is for instances of unlawful detention.

52. The source further objects to the submission made by the Government stating that detention is used as a last resort for the management of unlawful non-citizens. According to the source, this is not correct, as under sections 189 (1) and 189 (3) of the Migration Act, an unlawful non-citizen must be detained. This is thus a mandatory requirement for which an individual departmental officer cannot exercise any discretion.

53. In relation to the Government's discussion of *Al-Kateb v. Godwin*, the source reiterates that the basic premise is that the administrative detention of non-citizens, as opposed to citizens, is lawful and the cited case thus reinforces the position of Mr. Hamedani, i.e. that his arbitrary open-ended detention is authorized under Australian law (by legislation and case law).

Discussion

54. The Working Group wishes to thank both the source and the Government for their engagement in the present case and the extensive comments provided, which will assist the Working Group in reaching its conclusions in the case.

55. The Working Group observes that, in its reply, the Government of Australia maintains that its responsibility cannot be implicated in the present case as it holds no effective control over the Manus Regional Processing Centre, which is where Mr. Hamedani has been held for most of his detention. Since this is a fundamental issue to the present case, the Working Group shall examine it first.

56. The Working Group observes that Mr. Hamedani arrived by boat on Christmas Island. The source submits that this was on 5 August 2013 while the Government has submitted that it was on 31 July 2013.

57. According to the Government, Mr. Hamedani was transferred to the Manus Regional Processing Centre on 2 September 2013. The Government has not provided any explanation as to what happened to Mr. Hamedani during the month between his initial detention and his transfer. The Working Group therefore presumes that during that time he was in the custody of the Australian authorities.

58. Mr. Hamedani's transfer on 2 September 2013 was based on the agreement between Papua New Guinea and Australia concerning the processing of asylum claims. The Working Group observes that the Government of Australia has submitted that Papua New Guinea exercises exclusive effective control over persons taken there under the regional processing arrangements, as was the case of Mr. Hamedani.

59. However, the Australian authorities initially detained Mr. Hamedani on the sovereign territory of Australia, where he was held in custody for a period of at least one month. Therefore, the decision to detain him was made on Australian soil, by the Australian authorities, as was the decision to transfer him to the Manus Regional Processing Centre. The Working Group therefore rejects any submissions that the responsibility of the Australian authorities is not implicated in the initial detention of Mr. Hamedani or in the decision to transfer him to the Centre.

60. Furthermore, in relation to the time that Mr. Hamedani spent in the Manus Regional Processing Centre, the Working Group observes that the Government of Australia in its reply claims that its responsibility cannot be implicated as it holds no effective control over the facility.

61. However, the Working Group observes that UNHCR has stated that asylum seekers and refugees should ordinarily be processed in the territory of the State where they arrive,

or which otherwise has jurisdiction over them. Furthermore, all cooperation arrangements should build on and strengthen national asylum systems, not undermine or deflect responsibilities onto other States.[4]

62. The Working Group further notes the findings of UNHCR following its monitoring visits conducted to the Manus Regional Processing Centre, including during the time when Mr. Hamedani was there. In its report on the monitoring visit to Manus Island, Papua New Guinea on 23 to 25 October 2013, UNHCR concluded:

> UNHCR maintains its position that the physical transfer of asylum seekers from Australia to Papua New Guinea, as an arrangement agreed by two [States parties of the Convention relating to the Status of Refugees], does not extinguish the legal responsibility of Australia for the protection of the asylum-seekers affected by the transfer arrangements. In short, both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the … Convention and other applicable international instruments.[5]

63. This position is in line with that of the Working Group, which is explained in its revised deliberation No. 5 on the deprivation of liberty of migrants: when a State maintains migration detention facilities in the territory of another State, both States remain jointly responsible for the detention. The Working Group therefore considers that the Government of Australia remains responsible for the detention of Mr. Hamedani since his detention on 31 July 2013.

64. The Working Group will now consider the allegations made by the source that the detention of Mr. Hamedani was arbitrary and falls under categories II, IV and V and shall examine these in turn.

65. The source has alleged that the detention of Mr. Hamedani is arbitrary and falls under category II as he was detained while exercising the right to seek asylum. The Government of Australia has rejected these claims, noting that Mr. Hamedani was detained as an unlawful non-citizen as he did not have a valid visa upon his arrival in Australia.

66. The source has submitted that Mr. Hamedani arrived on Christmas Island to seek asylum while the Government has asserted that he arrived as an unlawful non-citizen. Upon his arrival, he was immediately detained by the Australian authorities. The Working Group notes that the Government of Australia does not dispute this fact but explains that if an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer must detain that person, noting that this is precisely was happened to Mr. Hamedani.

67. The Working Group observes, however that anyone seeking asylum is likely to arrive without a valid visa and reiterates[6] that seeking asylum is not a criminal act; on the contrary, seeking asylum is a universal human right, enshrined in article 14 of the Universal Declaration of Human Rights, and in the Convention relating to the Status of Refugees, and its Protocol. The Working Group notes that those instruments constitute international legal obligations undertaken by Australia.

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[4] See UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013, para. 15. Available at http://www.unhcr.org/publications/legal/58117aff7/unhcr-monitoring-visit-to-manus-island-papua-new-guinea-23-to-25-october.html. See also UNHCR position paper on bilateral and/or multilateral arrangements for processing claims for international protection and finding durable solutions for refugees (April 2016), available at www.refworld.org/pdfid/5915aa484.pdf; and UNHCR, guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers (May 2013), available at www.refworld.org/docid/51af82794.html, paras. 1 and 3 (vi).

[5] See UNHCR monitoring visit to Manus Island, para 16. See also the submission by UNHCR on the inquiry into the serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre (November 2016), para. 11, available at www.unhcr.org/58362da34.pdf.

[6] See opinions No. 28/2017 and No. 42/2017, and revised deliberation No. 5, para. 9.

68. As the Working Group has stated in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.

69. In the present case, Mr. Hamedani was detained upon his arrival by the Australian authorities, who held him for about one month before transferring him to the Manus Regional Processing Centre. It is thus clear to the Working Group that Mr. Hamedani was not detained in order to document his entry or verification of identity. On the contrary, the Working Group observes, as the source has pointed out that under sections 189 (1) and 189 (3) of the Migration Act, an unlawful non-citizen must be detained. This is a mandatory requirement for which an individual departmental officer cannot exercise any discretion.

70. However, the Working Group underlines that deprivation of liberty in the immigration context must be a measure of last resort and alternatives to detention must be sought in order to meet the requirement of proportionality. [7] As the Human Rights Committee has argued in paragraph 18 of its general comment No. 35 (2014) on liberty and security of person:

> [A]sylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

71. In its response, the Government of Australia has failed to explain the individualized, specific reasons that would have justified the need to deprive Mr. Hamedani of his liberty while his asylum claim would be considered. Furthermore, it failed to consider any alternatives to detention. On the contrary, as the Government itself clearly states, the purpose of its border protection policies, which include administrative detention, is to provide deterrence to others. It is thus clear to the Working Group that there was no individualized assessment carried out in relation to the need to detain Mr. Hamedani, and the Australian officials simply followed the policy of automatic immigration detention without any assessment of the need to detain or indeed without presenting Mr. Hamedani before a judicial authority. In other words, Mr. Hamedani was subjected to a mandatory immigration detention policy, which the Working Group has already determined to be arbitrary in a number of cases concerning Australia. [8] The Working Group reiterates that such policies are contrary to article 9 of the Covenant and breach the right to seek asylum as envisaged in international law. The Working Group therefore concludes that Mr. Hamedani was detained while exercising his right to seek asylum and his detention is therefore arbitrary, falling under category II.

72. The source has further submitted that the detention of Mr. Hamedani is arbitrary under category IV since he is a refugee who has been subjected to prolonged administrative custody and has not been guaranteed the possibility of administrative or judicial review or remedy. The Government of Australia denies those allegations, arguing that a person in immigration detention is able to seek judicial review of the lawfulness of his or her detention before the Federal Court or the High Court of Australia through such actions as habeas corpus.

73. The Working Group observes that Mr. Hamedani has been in detention since 31 July 2013. While Mr. Hamedani spent part of this time in the Manus Regional Processing Centre, the Working Group has already established that Australia cannot absolve itself of the responsibility in that regard. At the moment, Mr. Hamedani is held in an immigration detention centre in Australia and his only remaining option is to await the discretionary decision of the Minister for Immigration and Border Protection. The Working Group notes

[7] See A/HRC/10/21, para. 67. See also revised deliberation No. 5, paras. 12 and 16.

[8] See opinions No. 28/2017, No. 42/2017 and No. 71/2017.

that Mr. Hamedani has been waiting for such a decision since May 2017 and that the Government has not disputed any of these submissions in its reply.

74. The Working Group recalls that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[9] That right, which in fact constitutes a peremptory norm of international law, applies to all forms of deprivation of liberty[10] and applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities and migration detention.[11] Moreover, it applies irrespective of the place of detention or the legal terminology used in the legislation, and any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[12]

75. The Working Group observes that, since he was detained, Mr. Hamedani has not been admitted before any judicial body that could have examined the need for him to remain in detention, and no judicial body has ever been involved in the assessment of the legality of Mr. Hamedani's detention, which would necessarily involve the assessment of the legitimacy, need and proportionality to detain.[13] In fact, by the Government's own admission, the only avenue of redress available to Mr. Hamedani is to await the discretionary decision of the Minister for Immigration and Border Protection. This, however, is not a judicial body that could review the legality of his detention.

76. The Working Group also recalls the numerous findings by the Human Rights Committee where the application of mandatory immigration detention in Australia and the impossibility of challenging such detention has been found to be in breach of article 9 (1) of the Covenant.[14] Moreover, as the Working Group notes in its revised deliberation No. 5, detention in migration setting must be exceptional and in order to ensure this, alternatives to detention must be sought.[15] In the case of Mr. Hamedani, it is clear to the Working Group that there was never any consideration of alternatives to detention, which is a further breach of article 9 of the Covenant.

77. The Working Group thus concludes that Mr. Hamedani has been denied the right to challenge the continued legality of his detention in breach of article 9 of the Covenant and that his detention is therefore arbitrary, falling under category IV.

78. Furthermore, the source submits that the detention of Mr. Hamedani falls under category V, as Australian citizens and non-citizens are not equal before the courts and tribunals of Australia owing to the effective result of the decision of the High Court in *Al-Kateb v. Godwin*. According to that decision, while Australian citizens can challenge administrative detention, non-citizens cannot. The Government denies those allegations, arguing that in the cited case the High Court held that provisions of the Migration Act requiring detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future, were valid.

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[9] See A/HRC/30/37, paras. 2–3.

[10] Ibid, para. 11.

[11] Ibid, para. 47 (a).

[12] Ibid, para. 47 (b).

[13] See revised deliberation No. 5, paras. 12–13.

[14] See *C. v. Australia*; *Baban et al. v. Australia* (CCPR/C/78/D/1014/2001); *Shafiq v. Australia* (CCPR/C/88/D/1324/2004); *Shams et al. v. Australia* (CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004); *Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002); *D and E and their two children v. Australia* (CCPR/C/87/D/1050/2002); *Nasir v. Australia* (CCPR/C/116/D/2229/2012); and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013).

[15] See also A/HRC/13/30, para. 59. See also E/CN.4/1999/63/Add.3, para. 33; A/HRC/19/57/Add.3, para. 68 (e); A/HRC/27/48/Add.2, para. 124; and A/HRC/30/36/Add.1, para. 81. See also opinion No. 72/2017.

79. The Working Group is puzzled by the explanation provided by the Government in its reply as to the High Court's decision in that case, as it only confirms that the High Court affirmed the legality of the detention of non-citizens until they are removed, deported or granted a visa, even if removal were not reasonably practicable in the foreseeable future. In other words, the Government has actually failed to explain how such non-citizens can challenge their continued detention after that decision.

80. The Working Group notes the numerous findings by the Human Rights Committee, as referred to in paragraph 76 and footnote 18 above, and also notes that the effect of the decision of the High Court of Australia in the above-mentioned case is such that non-citizens have no effective remedy against their continued administrative detention.

81. In that respect, the Working Group specifically notes the jurisprudence of the Human Rights Committee in which it examined the implications of the High Court's judgment in the case of *Al-Kateb v. Godwin* and concluded that the effect of that judgment was such that there was no effective remedy to challenge the legality of continued administrative detention.[16]

82. In the past, the Working Group has concurred with the views of the Human Rights Committee on this matter,[17] and this remains the position of the Working Group in the present case. The Working Group underlines that this situation is discriminatory and contrary to articles 16 and 26 of the Covenant. It therefore concludes that the detention of Mr. Hamedani is arbitrary, falling under category V.

83. Finally, the Working Group notes with concern that the present case is among several cases concerning immigration detention in Australia that has come before it during the past year.[18] All of those cases address the mandatory immigration detention policy and, in all cases, the Working Group has found the detention to be arbitrary.

Disposition

84. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ghasem Hamedani, being in contravention of articles 2, 3, 7, 8 and 9 of the Universal Declaration of Human Rights and of articles 2, 9, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II, IV and V.

85. The Working Group requests the Government of Australia to take the steps necessary to remedy the situation of Mr. Hamedani without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

86. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Hamedani immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

87. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hamedani and to take appropriate measures against those responsible for the violation of his rights.

Follow-up procedure

88. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hamedani has been released and, if so, on what date;

[16] See *F.J. et al. v. Australia*, para. 9.3.

[17] See opinions No. 20/2018, No. 71/2017, No. 42/2017 and No. 28/2017.

[18] Ibid.

(b) Whether compensation or other reparations have been made to Mr. Hamedani;

(c) Whether an investigation has been conducted into the violation of Mr. Hamedani's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Australia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

89. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

90. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

91. The Government should disseminate through all available means the present opinion among all stakeholders.

92. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[19]

[*Adopted on 20 April 2018*]

[19] See Human Rights Council resolution 33/30, paras. 3 and 7.